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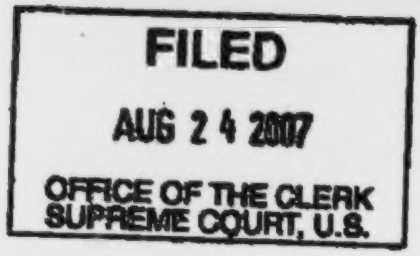


(2)

No. 06-1657

IN THE

# Supreme Court of the United States

DEBORAH A. MAYER,

*Petitioner,*

v.

MONROE COUNTY COMMUNITY SCHOOL CORPORATION, *ET AL.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

Thomas E. Wheeler, II, Esq.
Locke, Reynolds, LLP
1000 Capital Center
201 N. Illinois Street
Indianapolis, IN 46204
(317) 237-3800

## QUESTION PRESENTED

1. Whether this Court ought to adhere to the "basic constitutional obligation [of] avoiding unnecessary decision of constitutional questions" by dismissing the Petition based upon the Petitioner's failure to appeal the District Court's finding that her speech was not the motivating factor for the non-renewal of her teaching contract?

2. Whether the Seventh Circuit erred in utilizing this Court's decision in *Garcetti v. Ceballos* to find that the in-class curricular speech of an elementary school teacher is not subject to First Amendment protection?

## PARTIES TO THE PROCEEDING

The Petitioner has accurately listed the parties to the proceeding pursuant to Rule 14.1(b).

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| STATEMENT OF THE CASE | 1 |
| I. Pre-Speech Performance Problems. | 1 |
| II. The *Time for Kids* Article. | 2 |
| SUMMARY OF THE ARGUMENT | 5 |
| REASONS FOR DENYING THE PETITION | 6 |
| I. The Court need not address the constitutional issue raised as the case may be easily resolved on non-constitutional grounds. | 7 |
| II. The Seventh Circuit properly applied *Garcetti* finding that in-class speech by an elementary school teacher is not protected by the First Amendment | 9 |
| A. Garcetti supports the Seventh Circuit's Decision. | 10 |
| B. There is no split in the Circuits regarding academic freedom rights. | 14 |
| CONCLUSION | 18 |

## TABLE OF AUTHORITIES

### Cases

*Adler v. Board of Education*, 342 U.S. 485, 493 (1952).....14
*Ashwander v. TVA*, 297 U.S. 288, 347 (1936).....7
*Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).....13
*Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir.1991).....15
*Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 70 (4th Cir.1998).....15
*Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1052 (6th Cir. 2001).....16
*DiLoreto v. Downey Unified School Dist. Bd. of Education*, 196 F.3d 958 (9th Cir.1999).....15
*Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3rd Cir.1998).....15
*Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Village Sch. Dist.*, 428 F.3d 223.....16
*Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006).....6, 10, 11, 12
*Gilder-Lucas v. Elmore County Bd. of Educ.*, 2006 WL 1736833 (11th Cir.2006).....15
*Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) 17
*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).....13, 14
*James v, Bd. of Education*, 461 F.2d 566 (2nd Cir. 1972) ....16
*Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589 (1967).....11
*Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir.1990).....14
*Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719 (8th Cir.1998).....15
*Lee v. Weisman*, 505 U.S. 577 at 592.....14
*Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir.1991).....15
*Morse v. Frederick*, 127 S.Ct. 2618, 2640 (2007).....7

*Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983).....13
*Sweezy v. New Hampshire*, 354 U.S. 234 (1957).....11
*Van Deelen v. Johnson*, --- F.3d ----, 2007 WL 2309778, * 4 (10th Cir. 2007).....9
*Ward v. Hickey*, 996 F.2d 448, 452-453 (1st Cir.1993).....15
*Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir.1990).....15
*West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) .13

**Other Authorities**

Plato's Republic: Book II, Jowett Translation, Walter J. Black, Inc., 1942, p. 281 .....11
The Philosophy of Edmund Burke, University of Michigan Press, 1960, p. 247 .....11

## STATEMENT OF THE CASE

The Petition asks the Court to effectively constitutionalize the day-to-day interactions between supervisors and subordinates within the Nation's public schools, a proposition that this Court rejected in its decision in *Garcetti v. Ceballos*. The Petitioner, Deborah Mayer, was a failing teacher who interjected her personal opinions regarding the Iraq war into her elementary school classroom. She sought to use her speech and the First Amendment in order to reinstate her employment with the Respondent, the Monroe County Community School Corporation.

### I. Pre-Speech Performance Problems.

It is telling that in her Petition Ms. Mayer begins the factual narrative with an event that took place on January 10, 2003, ignoring earlier events that year. Two weeks into the 2002-03 school year Ms. Mayer was moved from a substitute teaching position into a full-time position when the regular teacher abruptly resigned. App. 12a. Ms. Mayer's classroom contained children in grades 3-6, most of whom had learning difficulties, and some of whom were receiving special education. App. 12a, 22a.

Parental complaints about Ms. Mayer's demeanor, conduct towards students, and professional competency surfaced almost immediately. These complaints were initially directed to the Principal Victoria Rogers who tried to handle them informally. They were also raised directly with Ms. Mayer during parent-teacher conferences held in October of 2002. App. 18a, 20a-23a. In all, seven families presented complaints during the first semester, well before the speech on January 10, 2003. *Id.*

During the first semester Principal Rogers attempted to quell the parents' concerns by noting that Ms. Mayer was a

new teacher and needed some time to get acclimated to her new classroom and the students. This approach was successful for a short time. However, as Christmas approached unhappy parents began demanding that their children be moved out of Ms. Mayer's classroom. App 20a, 21a, 23a. Several parents also began to complain that Ms. Mayer had begun retaliating against their children for their earlier complaints during the parent-teacher conferences. Principal Rogers attempted to accommodate the most vocal parents by transferring their children into other classrooms. App. 19a, 20a, 21a, 23a.

After she had moved four of the students out of Ms. Mayer's class, Principal Rogers was unable to accommodate any more transfers. App. 17a. One set of parents was so unhappy with Ms. Mayer and the School's inability to accommodate their transfer request that they removed their child from school, enrolled her at a private school, and requested that the School pay for her education. App. 17a. Two other sets of parents filed formal harassment complaints against Ms. Mayer under the School's anti-harassment policy alleging that Ms. Mayer had harassed and "verbally threatened" their children. App. 23a-24a.

## II. The *Time for Kids* Article.

It was within the context of this parental revolt, that on January 10, 2003, Ms. Mayer used a *Time for Kids* article to engage in a brief discussion of her personal opinions on war protests. This discussion "lasted probably no more that five minutes." App. 13a. During that time Ms. Mayer testified that she told the class that "[w]hen I drive past the courthouse square and the demonstrators are picketing I honk my horn because their signs say, 'Honk for Peace.'" *Id.* Ms. Mayer also stated that she told the class that "people ought to seek out peaceful solution to problems before going to war." *Id.*

Despite the brevity and relative innocuous nature of the discussion, one set of parents with whom Ms. Mayer had a particularly bad relationship seized upon these statements as yet another example of why Ms. Mayer was incompetent and why their daughter should be permitted to move out of her classroom. App. 14a. On January 13, 2003, Principal Rogers held a meeting with Ms. Mayer and these parents to try and diffuse the situation. *Id.* This meeting resulted in a memorandum being circulated to parents and staff noting that "[w]e absolutely do not, as a school, promote any particular view on foreign policy related to the situation with Iraq. That is not our business. Individuals in a democracy have personal beliefs, but a public school acknowledges various points of view and those might be discussed related [to] current events and news." App. 15a.

During the second semester Ms. Mayer's problems with parents continued and intensified. Parents continued to demand that their children be transferred from her class and continued to express the belief that their children were the subject of retaliation by Ms Mayer for prior complaints. These concerns are discussed in great detail in the District Court opinion and that discussion is incorporated herein by reference. App. 15a-24a. Having been unable to quell the problems in the classroom through meetings with parents, meetings with Ms. Mayer and student transfers, on February 7, 2003, Principal Rogers sent Ms. Mayer a "formal letter of concern" referring to the "volatile situation" in the classroom, the fact that she had been forced to move several students, and placing Ms. Mayer on an improvement plan designed to address her deficiencies. App. 24a.

Over the next two months, despite the improvement plan, Ms. Mayer's job performance progressively deteriorated and there were several meetings between she and various administrators to try to address the performance problems. App. 25a-26a.

After several attempts to respond to these increasingly serious problems were ignored by Ms. Mayer (App. 25a), on April 1, 2003, Principal Rogers sent her a letter summarizing the concerns and directing Ms. Mayer to respond in writing by April 2, 2003. *Id.* Rather than respond, upon receipt of Principal Roger's letter, Ms. Mayer simply stopped coming to work, missing the next two weeks and sent an e-mail stating that "I am ill today and not able to respond to all of your comments." App. 26a.

When Ms. Mayer did eventually respond to the letter of concern with her own three page single spaced letter of April 6, 2003, the letter never mentioned the Iraq war speech as a source of her problems. Instead, in the letter Ms. Mayer noted her "concern for the animosity that you [Principal Rogers] have directed toward me during the past few months." App. 26a (parenthetical supplied). Rather than attribute that animosity towards the Iraq war comments, Ms. Mayer instead attributed it as follows:

> Since the day I announced that I would be looking for employment elsewhere for next year as a result of the proposed RIF, you have taken measures to discredit me as a professional. Your pattern of behavior stemming from that time is incomprehensible to me and my colleagues but may explain why four teachers have occupied my present position in the past calendar year.

App. 26a. Ms. Mayer then listed twenty-two events which she believed to be harassment and noted that Principal Rogers had "a personal vendetta" against her and that "[a]ny further harassment, including the lack of a positive recommendation, will result in legal action on my behalf." *Id.* Yet despite the laundry list of concerns and the threatened legal action, the letter never mentions the Iraq war

speech or even suggest that the "harassment" by Principal Rogers was caused by Ms. Mayer's classroom comments. *Id.*

Ms. Mayer then skipped faculty meetings, refused suggestions to improve, and when she did return to the classroom her performance was poor. App. 27a. Following multiple observations and evaluations, on April 24, 2003, Principal Rogers decided to recommend the non-renewal of Ms. Mayer's teaching contract to the School Board. *Id.* On that same date she met with Ms. Mayer and advised her of this and gave Ms. Mayer the opportunity to resign. *Id.* Rather than respond, Ms. Mayer simply got up and left the building, despite having classroom responsibilities. *Id.* Later that day she called Principal Rogers and rejected the resignation option, stating that she was going to have her attorney respond. App. 28a.

During a meeting on April 24, 2003, the School Board voted unanimously not to renew Ms. Mayer's teaching contract. App. 28a.

## SUMMARY OF THE ARGUMENT

The Petition should be denied for two reasons. First, in ruling on the School's summary judgment motion the District Court found, as a matter of law, that Ms. Mayer's speech was not the motivating factor for the non-renewal of her teaching contract. Ms. Mayer did not appeal this decision, thus dooming her First Amendment claim regardless of whether this Court were to find the speech protected. Accepting the Petition on the issue of whether the speech is protected would be a useless act since even if the speech is protected, Ms. Mayer's claims ultimately lose due to her failure to appeal the Court's decision on Counts III and IV of her Complaint. Given the Court's "basic constitutional obligation of avoiding unnecessary decision of

constitutional questions" the Court should not grant the Petition because it would be, in effect, a useless act.

Second, the Seventh Circuit properly applied this Court's decision in *Garcetti v. Ceballos* to find that job related speech by an elementary school teacher is not protected by the First Amendment. To the extent that *Garcetti* reserved an issue regarding academic freedom rights, that issue was limited to speech by college and university professors, not elementary school teachers. Because the Seventh Circuit properly applied this Court's decision in *Garcetti v. Ceballos*, the Court should deny the Petition for this reason as well.

## REASONS FOR DENYING THE PETITION

In *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) this Court set forth the framework to be used when addressing the question of whether the First Amendment applies to job related speech by public employees. In that decision the Court discussed the two part framework for analyzing such claims:

> The first [part] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises [and *Pickering* balancing takes place].

*Garcetti*, 126 S.Ct. at 1958 (parenthetical supplied).

In the present case the Seventh Circuit, applying *Garcetti*, held that primary and secondary schoolteachers speaking in class as part of their teaching assignment speak

as employees, not as citizens, and thus such speech is not protected. Ms. Mayer asks this Court to reverse the Seventh Circuit and find, contrary to *Garcetti*, that such teachers do indeed have such First Amendment rights.

## I. The Court need not address the constitutional issue raised as the case may be easily resolved on non-constitutional grounds.

As an initial matter, the School requests that this Court deny the Petition based upon the "basic constitutional obligation of avoiding unnecessary decision of constitutional questions. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ('The Court will not pass upon a constitutional question although properly presented on the record, if there is also present some other ground upon which the case may be disposed of')." *Morse v. Frederick*, 127 S.Ct. 2618, 2640 (2007) (Breyer, J. concurring in part).

In the present case there is no need for the Court to address the issue presented in the Petition as even if Ms. Mayer's speech were found to be protected, she cannot as a matter of law present a *prima facie* case of retaliation since the District Court found her termination was justified on grounds other than speech (*i.e.* the classroom problems and parental disputes) and she failed to appeal that decision. App. 40a.

While the District Court did not engage in *Pickering* balancing since it found that Ms. Mayer's speech was not protected in the first instance under the First Amendment, the Court nevertheless was still required to assess the validity and viability of the School's reasons for discharging Ms. Mayer based on its resolution of Counts III and IV of the Complaint. Count I of the Complaint was the First Amendment claim that is the subject of this petition. Count

III of the Complaint was a state law breach of employment contract claim. App. 40a. Count IV of the Complaint was a state law claim contending that the School did not comply with certain of the statutory requisites for non-renewing Ms. Mayer's contract. App. 43a.

With respect to Counts III and IV, the District Court granted the School summary judgment finding that the non-renewal of Ms. Mayer's contract was not based on her speech, but was instead based on her job performance and the parental complaints: "On the basis of the Hahns' and the Foshas' complaints alone, school officials would be justified in concluding that Ms. Mayer's termination would be (1) in the school corporation's interest or (2) evidence of Ms. Mayer's inability to perform her teaching duties." App. 43a. Ms. Mayer did not appeal the entry of summary judgment on Counts III and IV, limiting her appeal to the First Amendment issue presented in Count I. App. 4a.

Assuming for purposes of argument that Ms. Mayer were able to overcome the *Garcetti* hurdle and demonstrate that her speech was protected, she then faces the burden of presenting a *prima facie* case of retaliation under the First Amendment.

> To make out a claim of unlawful retaliation by government officials in response to the exercise of his or her First Amendment right to petition, we have indicated three elements must be present. The plaintiff must show that (a) he or she was engaged in constitutionally protected activity; (b) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (c) the defendant's adverse action was substantially motivated as a response to the

> plaintiff's exercise of constitutionally protected conduct.

*Van Deelen v. Johnson*, --- F.3d ----, 2007 WL 2309778, * 4 (10th Cir. 2007).

Under this standard, even if Ms. Mayer convinces this Court that the Seventh Circuit got it wrong and that her speech was indeed protected, she still flounders on the third element of her *prima facie* case of retaliation. The District Court found, as a matter of law, that the nonrenewal of Ms. Mayer's contract was based on her poor job performance and the parental complaints, not on her speech. App. 43a-48a. Ms. Mayer's failure to appeal this finding makes it impossible for her to meet the third element of her *prima facie* case on the First Amendment claims. Thus Ms. Mayer will lose her case even if this Court chooses to address her First Amendment claim, finds in her favor overturning the Seventh Circuit's decision, and remands the case.

Under these circumstances, this Court's "basic constitutional obligation of avoiding unnecessary decision of constitutional questions" comes into play and the Petition should be denied.

## II. The Seventh Circuit properly applied *Garcetti* finding that in-class speech by an elementary school teacher is not protected by the First Amendment.

From the Respondents' perspective the question presented by Ms. Mayer answers itself. The question assumes, as it must, that Ms. Mayer's in-class speech on the Iraq war protests was made as an employee while teaching in the classroom and that her "speech is part and parcel of the approved curriculum ... ." In *Garcetti* this Court stated that

"[w]e hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*, 126 S.Ct. at 1960. A teacher teaching in the classroom is perhaps the quintessential example of job related speech. Consequently, the Seventh Circuit, applying *Garcetti*, held that "the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system." App. 7a-8a.

A. Garcetti supports the Seventh Circuit's Decision.

Simply put, the Seventh Circuit got it right. This Court's decision in *Garcetti* resolved this question once and for all. Public employees, including primary and secondary school teachers such as Ms. Mayer, simply do not have a constitutional right to interject their own opinions when speaking as employees. As noted in some detail in the Statement of Facts, Ms. Mayer was a failing teacher headed for termination who sought to avoid this outcome by interjecting her personal opinions regarding the Iraq war into her elementary school classroom and then seeking to use this single instance of speech as a First Amendment shield to avoid the termination of her employment. This type of fact pattern is precisely why this Court in *Garcetti* refused to extend constitutional protection to public employee on the job speech: "Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Garcetti*, 126 S.Ct. at 1959.

The Petitioner argues that this case falls outside the boundaries of *Garcetti* invoking the following language from the opinion:

> Second, Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. *See post*, at 1969 - 1970. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

*Garcetti*, 126 S.Ct. at 1962.

Justice Souter in his dissent in *Garcetti* noted his concern that:

> [t]his ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to official duties."

*Garcetti*, 126 S.Ct. at 1969 (Souter, J. dissenting). In making this argument Justice Souter relied on three cases, all from the college or university environment: *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Each of these cases relies on the same basic proposition espoused in

*Grutter*: "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Id.*, 539 U.S. at 309. Based upon the special niche that universities occupy, the majority in Garcetti agreed that the issue of the interaction between the concepts of academic freedom and "expression related to academic scholarship" and a School's rights as an employer was a subject better left to another day. *Garcetti*, 126 S.Ct. at 1962.

The problem with applying the *Garcetti* exception to the present case is that this case involves an elementary school teacher and not a professor at a public university. This Court has never expanded the concept of academic freedom beyond the "special niche" occupied by colleges and universities. Indeed courts throughout the United States have routinely refused to permit primary and secondary school teachers the same academic freedoms as college and university professors because of the marked difference in the two environments ranging from the age of the students to the compulsory nature of primary and secondary education.

As Plato noted almost 2500 years ago: "For a young person cannot judge what is allegorical and what is literal; anything that he receives into his mind at that age is likely to become indelible and unalterable; and therefore it is most important that the tales which the young first hear should be models of virtuous thoughts." Plato's Republic: Book II, Jowett Translation, Walter J. Black, Inc., 1942, p. 281. Sir Edmund Burke noted the danger of permitting individual primary school teachers to control curriculum: "He ought to be fearful of putting into the hands of youth writers indulgent to the peculiarities of their own complexion, lest they should teach the humors of the professor, rather then the principles of the science." Letter to a Member of the National

Assembly (1791). IV, 23-34, found in The Philosophy of Edmund Burke, University of Michigan Press, 1960, p. 247. For these reasons, Justice Frankfurter noted that curricular control was one of four "essential freedoms" for schools. *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 263-264 (1957).

Recognizing the essential freedom of public schools to determine for themselves what may be taught in their classrooms, this Court has acknowledged on many occasions the ability and the obligation of schools to control what is said and done in their names both by students and teachers.[1] Of particular concern to this Court has been the potential coercive effect of school sponsored speech on young students:

> As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to

[1] *See e.g.* for students *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) and for teachers *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) and *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983).

> employ the machinery of the State to enforce a religious orthodoxy.

*Lee v. Weisman*, 505 U.S. 577 at 592 (citations omitted). This logic applies with equal force to other types of potentially coercive in-class speech by teachers.

While this Court has held schools to a fairly strict standard when it comes to the dangers of coercive speech, it has also traditionally given schools the latitude necessary to limit such speech that might be attributed to them, particularly where such speech takes place as part of the school's curriculum. For example, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) the Court held that where speech may be fairly attributed to a school, it has much greater freedom in restricting that speech. *Id.*, 484 U.S. at 273.

Thus longstanding precedent from this Court has established that our Nation's primary and secondary schools, as employers, have wide discretion to limit teacher speech in the classroom without falling afoul of the First Amendment because of the coercive nature of the speech, the youth of the students, and the captive nature of the audience: "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern." *Adler v. Board of Education*, 342 U.S. 485, 493 (1952).

### B. There is no split in the Circuits regarding academic freedom rights.

The Circuit Courts have almost uniformly followed this Court's lead in refusing to recognize academic freedom rights outside of the college or university environment. For example, the Fifth Circuit in *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir.1990)

noted that "[a]lthough the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curriculum. ... We hold only that public school teachers are not free, under the first amendment, to arrogate control of the curricula." *Id.*, 890 F.2d at 801-802.[2]

In each of the Circuit Court cases to address this issue the speech was that of a teacher/lecturer in a traditional classroom setting. Since such speech is clearly part of the school's curriculum, these courts found it to be school-sponsored, governed by *Hazelwood*, and the school was entitled to restrict that speech. The rationale of each of these cases therefore fully supports the Seventh Circuit's application of the *Garcetti* decision to in-class speech by primary and secondary school teachers such as Ms. Mayer regardless of the "academic freedom" reservation.[3]

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[2] *See e.g. Ward v. Hickey*, 996 F.2d 448, 452-453 (1st Cir.1993); *Silano v. Sag Harbor Union Free School Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2nd Cir.1994); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3rd Cir.1998); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir.1998); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir.1990); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719 (8th Cir.1998); *DiLoreto v. Downey Unified School Dist. Bd. of Education*, 196 F.3d 958 (9th Cir.1999); *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir.1991); *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir.1991).

[3] The Eleventh Circuit in *Gilder-Lucas v. Elmore County Bd. of Educ.*, 2006 WL 1736833 (11th Cir.2006) also applied *Garcetti* to teacher speech: "We apply *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), and conclude that Gilder-Lucas's speech was not protected by the First Amendment because she spoke 'pursuant to [her] official duties,' *Id.* at 1958."

The only Circuits to depart from this rationale in the primary and secondary school context and recognize an academic freedom right are the Sixth Circuit, which did so in *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1052 (6th Cir. 2001) and to some extent the Second Circuit in the 1972 decision of *James v, Bd. of Education*, 461 F.2d 566 (2nd Cir. 1972). Ms. Mayer understandably relies on these two decisions. (Petitioner's Brief, p. 16-17) Indeed she states that "Mayer's speech would have been protected if only she had taught in Ohio instead of Indiana." This conclusion is inaccurate. As the Seventh Circuit noted, "[t]he Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials. To the extent that *James v. Board of Education*, 461 F.2d 566 (2nd Cir. 1972), and *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1052 (6th Cir. 2001), are to the contrary, they are inconsistent with later authority and unpersuasive." App. 6a-7a.

The Second Circuit in *Silano v. Sag Harbor Union Free School Dist. Bd. of Educ.*, 42 F.3d 719 (2nd Cir.1994), without mentioning the *James* decision by name, clearly appears to have repudiated that decision when it relied upon *Hazelwood* to reject a teacher's contention that his in-class speech was entitled to special First Amendment protection. *Id.*, 42 F.3d at 723-724. Similarly, the Sixth Circuit has also clearly called into question its decision in *Cockrel* where two of the three judges in *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Village Sch. Dist.*, 428 F.3d 223 called for a review of the *Cockrel* decision in light of more recent cases: "I concur in Judge Sutton's concurring opinion, which calls for a re-examination of this circuit's First Amendment jurisprudence regarding in-class curricular speech." *Evans-Marshall*, 428 F.3d at 238 (Zatkoff, J. concurring in part, dissenting in part). Thus any reliance on

*Cockrel* as supporting the proposition that in-class speech is protected by the First Amendment is not well taken.[4]

Based on the foregoing discussion, rather than a split in circuits as suggested by Ms. Mayer, there appears to be remarkable unanimity in the lower courts regarding whether the concepts of academic freedom and academic scholarship apply in the elementary and secondary school context such that First Amendment protections should attach to that speech. The split and any dispute instead appears to rest solely in the post-secondary context where this Court has recognized some form of academic freedom exists. As the Seventh Circuit noted:

> Mayer's current-events lesson was part of her assigned tasks in the classroom; *Garcetti* applies directly. How much room is left for constitutional protection of scholarly viewpoints in post-secondary education was left open in *Garcetti* and *Piggee* and need not be resolved today. Nor need we consider what rules apply to publications (scholarly or otherwise) by primary and secondary school teachers or the statements they make outside of class. It is enough to hold that the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart

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[4] Any reliance on *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) which holds that speech on a matter of public concern does not lose its protected status because it occurs in a private setting, is also inapposite to the facts of this case. In *Givhan* the teacher complained privately outside of the classroom to the principal about racially discriminatory practices in the school not in class as part of her job.

> from the curriculum adopted by the school system.

App. 7a-8a (some citations omitted).

The Seventh Circuit's decision applying *Garcetti* to in-class speech by an elementary school teacher is fully consistent with that decision as well as existing precedent from this Court, nor is there a conflict among the circuits that would justify *certiorari*.

## CONCLUSION

The petition should be denied.

Respectfully submitted,

Thomas E. Wheeler, II, Esq.
Locke, Reynolds, LLP
201 N. Illinois Street
P.O. Box 44961
Indianapolis, IN 46244-0961

*Counsel for the Respondents*

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